ble threat of imminent prosecution. *Navegar*, 103 F.3d at 998. Under *Navegar*, a plaintiff cannot establish such a threat merely by showing that the law is generally enforced. *Id.* at 1001. Rather, under *Navegar*, plaintiffs must demonstrate "prior threats against them or [other] characteristics indicating an especially high probability of enforcement against them." Pet. App. 13a. The court of appeals concluded that none of the petitioners had made such a showing. *Id.* at 13a-15a.

Judge Sentelle dissented. Pet. App. 16a-20a. In his view, because petitioners had shown that their intended behavior is covered by a criminal statute that is generally enforced, they satisfied the standard for alleging a credible threat of enforcement set forth in *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). Pet. App. 16a-18a. Judge Sentelle also concluded that while *Babbitt* involved a First Amendment claim, the same standard should apply to Second Amendment claims. *Id.* at 18a-19a.

5. The court of appeals denied the petition for rehearing en banc. Pet. App. 23a-24a. Three judges filed statements concerning the order denying rehearing en banc. Chief Judge Ginsburg concurred in the denial of rehearing en banc. He concluded that the pistol petitioners did not satisfy the standards for bringing a preenforcement challenge to a criminal statute. He reasoned that because petitioners could have sought to register pistols and then challenged the subsequent denial of their applications in the courts of the District of Columbia, this case "does not present a circumstance in which a plaintiff is 'required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id.* at 26a (quoting *Babbitt*, 442 U.S. at 298). Chief Judge Ginsburg further concluded that petitioner Hailes

lacked standing to challenge the trigger lock requirement, because "it is highly speculative" whether "she would ever find it necessary to remove the trigger lock in order to defend herself in her home," and whether "she would then be prosecuted for that action." *Id.* at 26a-27a.

Judge Williams expressed the view that the pistol petitioners had established a sufficiently imminent threat of prosecution to establish standing because the D.C. Code "unequivocally" bars issuance of permits for pistols. Pet. App. 28a. Judge Williams also concluded that petitioner Hailes had established standing, because "[t]he risk of prosecution in the event of the contingency [Hailes] fears is high." *Id.* at 29a. Judge Sentelle largely agreed with Judge Williams' reasoning. *Id.* at 27a.

ARGUMENT

The court of appeals correctly held that petitioners failed to satisfy the standards for bringing a preenforcement challenge to a criminal statute. The court's decision does not conflict with any decision of this Court or any other courts of appeals. Review by this Court is therefore not warranted.

1. Petitioners contend (Pet. 7) that the decision below conflicts with *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). In particular, they argue that the court of appeals failed to follow *Babbit*'s holding that "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await a criminal prosecution as the sole means of seeking relief." *Id.* at 298.

The court of appeals, however, did not depart from that holding. Instead, applying its previous decision in *Navegar* v. *United States*, 103 F.3d 994 (D. C. Cir. 1997), the court concluded that petitioners failed to establish a credible threat of prosecution as required by *Babbitt*. As the court explained, *Navegar* held that, in order to establish a credible threat of prosecution, a plaintiff must show either that he was threatened with prosecution or that he has a characteristic that puts him at a heightened risk of prosecution, and petitioners failed to make either showing. Pet. App. 13a.

Petitioners argue (Pet. 11) that, under *Babbitt*, a plaintiff can demonstrate a credible threat of prosecution by showing that he intends to engage in conduct that violates the statute and that the government maintains a general intent to enforce the statute. But *Babbitt* did not purport to hold that a such a showing would always enable a plaintiff to establish that he faces a sufficiently credible threat of prosecution to justify a preenforcement challenge to a criminal statute. *Babbitt* involved a First Amendment claim, and what is sufficient to satisfy the credible threat requirement in that context is not necessarily sufficient in other contexts. Indeed, in *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965), the Court expressly held that preenforcement challenges to criminal statutes on First Amendment grounds involve distinct considerations because "free expression" has a "transcendent value to all society, and not merely to those exercising their rights."

In any event, even if petitioners could satisfy *Babtitt*'s credible threat requirement, that would not make their preenforcement challenge justiciable. *Babitt* authorizes a preenforcement challenge to a criminal statute only when "await[ing] criminal prosecution" is

"the sole [alternative] means of seeking relief." 442 U.S. at 298. Petitioner failed to satisfy that independent requirement here. As Chief Judge Ginsburg correctly observed in his opinion concurring in the denial of rehearing en banc, petitioners had a ready means for seeking relief with respect to the pistol prohibition without awaiting criminal prosecution. They could have applied to register a pistol with the Chief of Police and then challenged the subsequent denial in the District of Columbia Court of Appeals. Pet. App. 26a; see D.C. Code §§ 2-510(a), 7-2502.10(b), 7-2507.09 (2001); *Fesjian* v. *Jefferson*, 399 A.2d 861 (D.C. 1979) (considering constitutional challenges to District gun statute upon appeal from denial of registration). And if that court issued an adverse decision, petitioners could seek a petition for a writ of certiorari from this Court. 28 U.S.C. 1257. The existence of that alternative avenue for review also renders their claim here unripe and furnishes an independent basis for a court to withhold the equitable relief petitioners seek.

Petitioners argue (Pet. 22) that the existence of that alternative remedy is not relevant because they have sued under 42 U.S.C. 1983, and exhaustion of administrative remedies is not a prerequisite to such suits. But Section 1983 does not create a cause of action against federal officials acting under color of federal law. *Wheeldin* v. *Wheeler*, 373 U.S. 647, 650 & n.2 (1963). And when the United States Attorney prosecutes District firearms violations, he is a federal official acting under color of federal law. See Act of July 29, 1970, Pub. L. No. 91-358, § 210(a), 84 Stat. 604 (D.C. Code § 23-101 (2001)) (authorizing the United States Attorney to prosecute such offenses "in the name of the United States").

Petitioners' suit against the Mayor of the District of Columbia arises under Section 1983. But nothing in Section 1983 eliminates the established rule that a plaintiff may not bring a preenforcement challenge to a criminal statute when there is an alternative way to challenge the law without awaiting criminal prosecution. The existence of an alternative mechanism to challenge the law is relevant to the ripeness analysis, which is distinct from principles of exhaustion. Petitioners' reliance on Sectior 1983 is therefore misplaced.

Petitioners also argue (Pet. 3) that they should not be required to invoke a futile administrative remedy. But that assertion of futility ignores the availability of judicial review for their claims in the District of Columbia Court of Appeals.[2]

2. Petitioners contend (Pet. 7, 15-18) that the decision below conflicts with the Sixth Circuit's decision in *Peoples Rights Organization, Inc.* (*PRO*) v. *Columbus*, 152 F.3d 522 (1998). There is, however, no conflict.

In *PRO*, plaintiffs brought a preenforcement challenge to a provision of the Columbus City Code that prohibited the possession and sale of assault weapons. The plaintiffs alleged that they could not determine whether weapons they owned were "assault weapons" within the meaning of the ordinance, and that the ordinance was

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[2] For the same reason, petitioners' reliance (Pet. 22) on *Bach* v. *Pataki*, 408 F.3d 75 (2d Cir. 2005), is misplaced. In that case, the court held that a plaintiff did not have to file a futile application for a license before bringing a preenforcement challenge to a gun licensing statute. But the court in that case focused solely on the absence of a viable administrative remedy. *Id.* at 83. It did not address the question whether the availability of judicial review of the denial of a licence would serve as an adequate alternative remedy.

therefore unconstitutionally vague. 152 F.3d at 526, 528. The Sixth Circuit held that, based on the city's representation "that it fully intends to prosecute anyone who violates the provisions of the ordinance," *id.* at 529, the plaintiffs had alleged a sufficient threat of prosecution to confer standing, *id.* at 530. But in so holding, the Sixth Circuit expressly distinguished its prior decision in *National Rifle Ass'n* v. *Magaw*, 132 F.3d 272 (1997). In that case, the Sixth Circuit held that plaintiffs lacked standing to challenge federal gun legislation because they merely expressed the "desire" and "wish" to engage in certain possibly prohibited activities, but were "restrained" and "inhibited" from doing so by the federal legislation. *Id.* at 293.

Petitioners here are more like the plaintiffs in *Magaw* than like the plaintiffs in *PRO*. Petitioners do not allege that they presently own pistols within the District. They have alleged only a desire or wish to possess pistols and claim to be restrained from doing so by the District's prohibition. C.A. App. 14, 15. There is therefore no conflict between the D.C. and Sixth Circuits on the question presented here.

This case is distinguishable from *PRO* in another important respect. As discussed above, petitioners have an alternative way to challenge the laws at issue without violating them and risking criminal punishment. By contrast, the plaintiffs in *PRO* had no apparent means of obtaining a judicial determination of their claims, other than by undergoing a criminal prosecution. See 152 F.3d at 530. For that reason as well, the Sixth Circuit's decision in *PRO* provides no assistance to petitioners here.

3. As petitioners note (Pet. 23), there is no administrative process that would permit petitioner Hailes to

challenge the trigger lock requirement. Petitioner Hailes' claim is not justiciable, however, because it is too speculative to satisfy standing and ripeness requirements.

In order to have standing, a plaintiff bringing suit to prevent a future injury must show that the injury is "imminent" or "certainly impending." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990). "Allegations of possible future injury do not satisfy the requirements of Art. III." *Ibid.* In addition, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (citation omitted).

Under those standards, petitioner Hailes has failed to establish standing and ripeness. Rather than alleging an imminent harm, she alleges only that she currently possesses a registered shotgun in her home, C.A. App. 14-15, and that, "[b]ut for D.C. Code § 7-2507.02, she would remove the trigger lock when she deems it necessary to defend herself in her home." *Id.* at 15. That chain of events is too speculative to satisfy standing or ripeness requirements.

Petitioner Hailes' alleged injury is speculative for another reason. Even if the chain of events petitioner Hailes identifies were to occur, it is entirely speculative whether a prosecutor would bring criminal charges against her. See *Blanchette* v. *Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 143 n.29 (1974). Indeed, if petitioner Hailes were to use her shotgun in self-defense, she would likely have a defense to any criminal charge. See *Wilson* v. *United States*, 198 F.2d 299, 300 (D.C. Cir. 1952) (holding that, though not expressly provided

(3)

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IN THE

Supreme Court of the United States

SANDRA SEEGARS, GARDINE HAILES, ABSALOM F. JORDAN, JR., CARMELA B. BROWN, AND ROBERT N. HEMPHILL,
Petitioners,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, AND ANTHONY A. WILLIAMS, MAYOR, DISTRICT OF COLUMBIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

1. For the United States, the courthouse door is closed to declaratory judgment actions by law-abiding persons, and is open only to persons who recklessly flaunt the law to the extent that specific law enforcement officers have informed them that their arrest and prosecution are imminent. Whale watchers and profit seekers have standing, but prudent persons who seek to provide for their security from criminal attack do not.

2. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), held:

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973).

The United States appears to assume that the term "a credible threat of prosecution" is limited to a threat arising out of a current violation by the plaintiffs known to the police – why else would one be directly "threatened with prosecution" or have "a characteristic that puts him at a heightened risk of prosecution." Opposition 9. This assumes that the plaintiffs must violate a criminal statute to obtain standing in a civil case – a curious result given that the issues in that situation would be litigated in an actual criminal prosecution. The term "a credible threat of prosecution" must include the situation here, *i.e.*, plaintiffs will do what the law expressly forbids, but to avoid actual prosecution will do so only when a court invalidates the law – and at that point will incontestably do so

"forthwith." This is the kind of case the Declaratory Judgment Act is designed to accommodate.

Doe v. *Bolton*, *supra*, makes plain that the United States, and the court of appeals, have a too cramped view of what is a "credible threat of prosecution." In *Doe*, the physician-appellants alleged only that "the Georgia statutes 'chilled and deterred' them from practicing their respective professions and deprived them of rights guaranteed by the First, Fourth, and Fourteenth Amendments." 410 U.S. at 186.

They did not allege that law enforcement officers had informed them that their arrest and prosecution are imminent. This Court nonetheless concluded that:

> the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

Id. at 188.

Doe went on to explain that Georgia's statute "is recent and not moribund" and "is the successor to another Georgia abortion statute under which, we are told, physicians were

prosecuted." *Id.* at 188-189.[1]

The same is true here. While none of the Petitioners has been prosecuted, or directly threatened with prosecution, they are the ones against whom these criminal statutes directly operate. They thus assert a sufficiently direct threat of personal detriment and should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

Babbitt rejected the argument that standing did not exist because the criminal penalty had not been (and might never be) applied. The determining criteria were that "the State has not disavowed any intention of invoking the criminal penalty provision," and that the fear of prosecution was not "imaginary or wholly speculative." 442 U.S. at 302.

Similarly, *Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 393 (1988), concluded that "plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them." The law would be so enforced, in other words, *if* plaintiffs violated the law. Instead of violating the law, plaintiffs sought a declaratory judgment. Here, plaintiffs also have "an actual and well-founded fear" that the law would be enforced against them if they disobeyed it. They choose not to disobey the law to preclude an actual prosecution and to obtain a judgment that would allow them forthwith to do precisely what the law forbids.

The United States seeks to restrict what *Babbitt* calls "conduct arguably affected with a *constitutional interest*," only to conduct protected by the First Amendment. Opposition 9.

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[1] By contrast, *Younger v. Harris,* 401 U.S. 37, 42 (1971), denied standing where certain plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible."

Yet the precedent it cites, *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965), also includes broader language, such as the need to "assure adequate vindication of constitutional rights." *Id.* at 485. Referring to laws with "an overbroad sweep" – which surely applies here – *Dombrowski* stated: "The assumption that defense of a criminal prosecution will generally assure ample vindication of *constitutional rights* is unfounded in such cases." *Id.* at 486 (emphasis added).[2]

Petitioners properly allege "conduct arguably affected with a constitutional interest" in their claim that the prohibitions at issue infringe on "the right of the people to keep and bear arms" guaranteed by the Second Amendment to the U.S. Constitution. While the United States does not take a position on the merits, it agrees that the Second Amendment "protects the rights of individuals . . . to possess and bear their own firearms." Opposition 5 n.1. Consistent therewith, Congress only authorized the District to pass "usual and reasonable police regulations . . . necessary for the regulation of firearms," D.C. Code § 1-303.43, not to ban an entire class of firearms from possession by law-abiding citizens.

3. The United States argues that plaintiffs lack standing since they could have pursued this litigation in the District's court system rather than in Federal court. Opposition 10. Yet this Court has never held that a party lacks standing in one court if suit could have been filed in another court. In civil rights litigation, one generally has the option of filing either in

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[2] The relaxed rule of standing recognized by *Dombrowski* in First Amendment cases was waiver of the "requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Id.* Petitioners here make no such argument.

Federal or State court. The fact that a State court (or a D.C. court) could rule on a constitutional issue does not imply that plaintiffs lack standing to litigate that issue in the Federal court.[3]

4. The United States argues that, since no cause of action exists against the United States under 42 U.S.C. § 1983, it is not subject to the rule that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 516 (1982). Opposition 10. But § 1983 does apply to District ordinances,[4] and *Patsy* teaches that exhaustion of administrative remedies is not required. It would be curious if plaintiffs were not required to exhaust administrative procedures as to the District defendant, but would be required to exhaust them as to the Federal defendant. At any rate, the argument confuses rules of standing with rules about causes of action.[5]

The United States argues that plaintiffs must pursue a futile administrative remedy and then appeal to the District's courts for relief. Opposition 11 & n.2. It suggests that the

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[3] *Baggett v. Bullitt*, 377 U.S. 360, 366 (1964) (reversing lower court holding that "although the challenge raised a substantial constitutional issue, adjudication was not proper in the absence of proceedings in the state courts which might resolve or avoid the constitutional issue").

[4] *See* 42 U.S.C. § 1983 (imposing liability on "Every person who, under color of any . . . ordinance . . . of . . . the District of Columbia, subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws").

[5] *See Steffel v. Thompson*, 415 U.S. 452, 475 (1974) ("we do not require petitioner first to seek vindication of his federal rights in a state declaratory judgment action").

holding to the contrary in *Bach v. Pataki*, 408 F.3d 75, 82 (2nd Cir. 2005), focused only on the futility of an administrative remedy without regard to a possible judicial remedy. Yet *Bach* cites numerous decisions by New York courts stemming from judicial review of denials of licenses to carry firearms. *Id.* at 79-82. Immediately following that discussion, the court held that "Bach's failure to file a license application does not pose an obstacle to consideration of his claims." *Id.* at 82.

Bach was hardly oblivious to the issue being whether one must apply and get denied and then seek judicial review, or bypass a futile application and file suit. It held that the former served no purpose:

> Imposing a filing requirement would force Bach to complete an application for which he is statutorily ineligible and to file it with an officer without authority to review it. "We will not require such a futile gesture as a prerequisite for adjudication in federal court." *Williams v. Lambert*, 46 F.3d 1275, 1280 (2d Cir.1995) . . . . Bach's claims are thus justiciable.

Id.

The above quotation from *Williams* relates directly to the futility of filing a judicial appeal from an adverse administrative decision, because the law would plainly require the court to uphold the denial.[6] Here, because the law clearly bars registration and possession of a pistol, it would be futile to apply to register a pistol and equally futile to seek judicial

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[6] *Williams* states just before the above quotation that the plaintiff "could still file a petition in the New York state courts," but "such a gesture . . . would be a futile one, as her case would be dismissed summarily under the clear language of" the statute. 46 F.3d at 1280.

review of the denial.[7] In the words of Judge Williams, "it is mysterious to me how plodding through the charade of seeking permits would render the threat of prosecution (and thus the need to forego measures for their security) one iota more imminent." App. 28a.

5. The United States argues that no conflict exists between the decision below and *Peoples Rights Organization, Inc. v. Columbus*, 152 F.3d 522, 528-29 (6th Cir. 1998) ("*PRO*"). Opposition 11-12. The court below found that "*PRO* is plainly inconsistent" with its own holding and that "Plaintiffs correctly argue that [*PRO*] supports preenforcement standing in precisely this circumstance." App. 14a.

PRO found standing where plaintiffs "can either possess their firearms in Columbus and risk prosecution under the City's law, or, alternatively, they can store their weapons outside the City, depriving themselves of the use and possession of the weapons." 152 F.3d at 529. That is precisely the dilemma of petitioner Jordan, who would risk prosecution by possessing his pistol in the District, and who is deprived of its use because he must store it outside the District.

The United States argues that plaintiffs here are like those in *National Rifle Ass'n. v. Magaw*, 132 F.3d 272, 293 (6th Cir. 1997), in which "the individual plaintiffs aver that they 'desire' and 'wish' to engage in certain possibly prohibited activities" and had "telephoned BATF agents, submitted a hypothetical question, and received an answer that the questioned activity could subject them to federal prosecution"

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[7] *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-68 (1977) (a person who never applied for a job is entitled to retroactive seniority if he can show that applying would have been a futile gesture because of the employer's pervasive discriminatory hiring practices).